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No. 02-628

In the Supreme Court of the United States

LINDA FREW, ON BEHALF OF HER DAUGHTER, CARLA FREW, *ET AL.*,
Petitioners,

v.

ALBERT HAWKINS, COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARTIES

On January 6, 2003, Albert Hawkins became the Commissioner of the Texas Health and Human Services Commission, taking the place of Don Gilbert, who was named in the petition. Accordingly, respondents have substituted Commissioner Hawkins for former Commissioner Gilbert in the caption of this case. *See* SUP. CT. R. 35.3(3).

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BRIEF IN OPPOSITION

The Court should deny the petition for certiorari because it does not present an important or unsettled question of federal law over which the courts of appeals conflict. *See* SUP. CT. R. 10(a), (c). The Fifth Circuit correctly held that the district court lacked jurisdiction to order state officials charged with administering a Texas Medicaid program to satisfy requirements beyond those mandated by federal law. Additionally, the petition poses a question on waiver of sovereign immunity that was never presented or passed upon by the courts below. Finally, this case is inappropriate for the Court's review because an alternative ground for affirmance exists that would require the Court to engage in a cumbersome, case-specific analysis of the consent decree that petitioners seek to enforce. Accordingly, the Court should deny the petition.

STATEMENT OF THE CASE[1]

This case involves a district court's endeavor to oversee state officials' administration of a Medicaid program aimed at the health care of indigent youth. The suit began in 1993 when petitioners alleged that state officials were failing to provide Medicaid benefits under the Texas version of the "early and periodic screening, diagnostic, and treatment services" (EPSDT) program in accordance with federal law. App. 6a-7a; 1.R.1; 3.R.821.[2]

In June of 1994, the district court certified the case as a class-action lawsuit, and, according to the district court, the class consists of over 1.5 million Texas youth.[3] App. 7a & n.6, 54a. In August

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1. The court of appeals correctly set out the factual and procedural history of the case. *See* App. 3a-11a.

2. References to the record in the court of appeals are cited as "__.R.__," with the first numeral representing the volume of the record and the second numeral indicating the page number.

3. The district court noted at the time it adopted the consent decree that the class represents about 26% of Texans under the age of 21.

1994, the district court denied the state officials' motion for dismissal, which argued that petitioners lacked the necessary federal rights to make their claims actionable under 42 U.S.C. §1983. 3.R.807. In conformance with a scheduling order, the parties conducted eight settlement negotiation sessions and developed a consent-decree proposal. App. 7a & n.7; 3.R.875; 3.R.1013. After conducting a fairness hearing, the district court approved and entered a consent decree in February 1996. App. 7a; 4.R.1028.[4] The consent decree is a lengthy document made up of 308 paragraphs of detailed and specific procedures for Texas's EPSDT program. App. 7a-8a & n.9.

Even before the consent decree, state officials operated a substantial EPSDT program that, according to the court of appeals's survey, underwent dramatic improvements.[5] App. 3a. Nevertheless, in November 1998, petitioners moved to enforce the decree, claiming that state officials had failed to fully comply with their interpretation of the decree. App. 9a-10a. The district court conducted an evidentiary hearing, and, on August 14, 2000, issued a 175-page decision, agreeing with petitioners, and rejecting the state officials' contentions that: the decree was largely unenforceable due to an absence of federal rights; the State's sovereign immunity precluded the district court from enforcing the decree beyond the requirements of federal law; and petitioners' extraordinarily expansive interpretation of the decree's provisions

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3.R.598.

4. Petitioners filed the consent decree with the Court as a lodging. *See* Pet. 1.

5. In fact, there was no evidence in this case that a single, eligible person requested services and did not subsequently receive them. *See* App. 4a, 101a-02a & n.51. In spite of all the improvements in the EPSDT program, some eligible Texans fail, for whatever reason, to fully utilize the services. *See* App. 4a.

was not supported by the agreement. 11.R.3628; App. 10a; App. 54a-275a.[6]

State officials appealed the August 14, 2000 order, which the Fifth Circuit stayed during the pendency of the appeal. App. 11a. Notwithstanding state officials' pending appeal and the stay, petitioners successfully sought leave in the district court to file a supplemental complaint adding new dental claims. App. 11a. The district court denied the state officials' motion to dismiss the supplemental complaint on the basis that the decree-enforcement appeal divested the district court of jurisdiction to grant the motion to supplement. The state officials filed a second appeal from that ruling, and the Fifth Circuit consolidated the two appeals. App. 11a.

The Fifth Circuit vacated the district court's orders in both appeals and remanded the case. App. 46a. Recognizing the Eleventh Amendment's limitation on the district court's subject-matter jurisdiction, the Fifth Circuit reaffirmed that court's prior holdings that the *Ex parte Young* exception to Eleventh Amendment immunity[7] permitted the district court to enforce the consent decree only to the reach of federal law. App. 19a-28a. To determine whether petitioners stated claims to which the *Young*

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6. By separate order, characterized as an initial "order of enforcement," the district court directed state officials to submit, within sixty days, "proposed corrective action plans to remedy each violation of the consent decree detailed in Part One of this court's Memorandum Opinion," gave petitioners thirty days to respond to the proposed plans, ordered the parties to meet in the subsequent fifteen days to facilitate agreement on a remedial order, and required the parties to report the results to the court. App. 277a-78a.

7. In *Young*, the Court held that official-capacity suits do not offend the Eleventh Amendment if they seek only injunctive relief, and allege that state officials are violating federal law. *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

exception applied, the court reviewed established case law on the enforceability of federal rights under 42 U.S.C. §1983, and examined petitioners' complaints to determine whether they implicated federal rights that the district court could enforce. App. 13a-19a, 33a-39a. Upon conducting this review, the Fifth Circuit held that no enforceable rights were the subject of the district court's opinion. App. 12a.

The district court, by contrast, entered its orders without performing such an analysis. Instead, the court decided that all of the decree provisions were enforceable under its interpretation of the agreement. App. 13a-14a. State officials protested the district court's expansive reading of the consent decree to the Fifth Circuit, but that court never reached the interpretation questions because it determined that the district court's orders did not implicate enforceable federal rights. App. 12a.

SUMMARY OF ARGUMENT

The Court should deny the petition for writ of certiorari because the Fifth Circuit correctly held that the Eleventh Amendment precludes the district court from enforcing consent-decree provisions that exceed the requirements of federal law. The court of appeals properly recognized that the *Ex parte Young* doctrine limits injunctive relief to enforcement of federal rights. That holding—which is entirely consistent with this Court's Eleventh Amendment jurisprudence and federal-rights decisions, as well as decisions by other circuits—does not warrant review.

Apart from the correctness of the Fifth Circuit's decision, the petition should be denied because the waiver-of-immunity issue presented was not properly litigated or decided by the courts below. Nor, contrary to petitioners' assertions, does the Fifth Circuit's decision implicate a circuit split or an important and unsettled question of federal law. *See* SUP. CT. R. 10(a), (c). Moreover, the case is an inappropriate candidate for review because strong,

alternative grounds exist for affirming the judgment below. And consideration of these grounds would mire the Court in a case-specific and cumbersome analysis of the terms of the consent decree that would not further federal interests. Accordingly, the Court should deny the petition for writ of certiorari.

REASONS TO DENY THE PETITION

I. BECAUSE THE WAIVER-OF-IMMUNITY ISSUE WAS INTERJECTED AT THE ELEVENTH HOUR, AND BECAUSE THE PETITION INCLUDES A DIFFERENT WAIVER QUESTION THAN THAT PRESENTED BELOW, THIS CASE IS AN INAPPROPRIATE CANDIDATE FOR REVIEW.

A. Petitioners Inadequately Pressed the Issue of Waiver of Sovereign Immunity Below by Raising the Issue for the First Time After Briefing in the Court of Appeals.

Petitioners never argued in the district court that the State of Texas waived its sovereign immunity. Moreover, nowhere in petitioners' briefing in the court of appeals did they assert a waiver of Eleventh Amendment immunity. Indeed, petitioners failed to raise the issue even after the court of appeals permitted them to file a twenty-seven page supplemental brief on a district-court decision regarding sovereign immunity in a Medicaid suit and on other issues in the appeal. *See Frazar v. Gilbert*, No. 00-41112, Appellees' Resp. Br. (May 22, 2001) (discussing, *inter alia*, *Westside Mothers v. Haveman*, 133 F.Supp.2d 549 (E.D. Mich. 2001), *rev'd*, 289 F.3d 852 (CA6), *cert. denied*, 123 S.Ct. 618 (2002)).

It was not until a letter filed in October 2001 pursuant to Federal Rule of Appellate Procedure 28(j), that petitioners alleged, *for the first time*, that the State's sovereign immunity somehow had been waived. With a one-sentence assertion, petitioners claimed that a particular paragraph—¶303—of the consent decree represents

"an express and unequivocal waiver of the Defendants' Eleventh Amendment immunity." Oct. 3, 2001 Letter 1 (quotation and citation omitted).[8] At no point below did petitioners argue that the State's mere agreement to the consent decree waived its Eleventh Amendment immunity, as they argue now for the first time in this Court.

As the Fifth Circuit noted, "[w]aiver of sovereign immunity is not a new concept." App. 39a n.95. Petitioners had ample opportunity to properly press a waiver argument in the courts below and failed to do so.[9] Despite petitioners' waiver of such arguments, the Fifth Circuit's opinion addressed their belated and undeveloped waiver contention—albeit in a cursory dismissal within a closing section entitled "Other Issues." App. 39a. With no real briefing by the parties on this issue in the courts below and no comprehensive analysis in the Fifth Circuit's opinion, the issue has not been

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8. Petitioners repeated that ¶303 assertion in a later Rule 28(j) letter. *See* May 17, 2002 Letter (citing *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 122 S.Ct. 1640 (2002)). Again, the sole basis of waiver alleged was the language in ¶303.

9. Courts have uniformly barred late invocations of waiver like that of petitioners, even under an "intervening-decision" exception. *See, e.g., In re Hood*, No. 01-5769, 2003 WL 21496, at *3 (CA6 Feb. 3, 2003); *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 331-32 (CA5 2002); *R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 50-51 (CA1 2002); *Martinez v. Tex. Dep't of Crim. Justice*, 300 F.3d 567, 573-75 (CA5 2002); *Watters v. Wash. Metro. Area Transit Auth.*, 295 F.3d 36, 42 n.13 (D.C. Cir. 2002), *pet. for cert. filed*, 71 U.S.L.W. 3476 (U.S. Nov. 4, 2002) (No. 02-1034); *In re Gosselin*, 276 F.3d 70, 72 (CA1 2002); *Power v. Summers*, 226 F.3d 815, 819 (CA7 2000). This procedural default rule, twice invoked by the Fifth Circuit since its decision in this case, *see Perez*, 307 F.3d, at 331-32; *Martinez*, 300 F.3d, at 573-75, enables courts to evaluate waiver claims with the benefit of argument and record development—elements that are decidedly missing in this case.

readied for the Court's review.[10] And to the extent any waiver issue was raised—belatedly and insufficiently—in Rule 28(j) letters, that issue was limited to whether ¶303 of the decree was an express waiver of immunity. The distinct issue advanced by petitioners for the first time in this Court is whether agreement to the consent decree in general waives immunity.[11]

Given that the district court never had an opportunity to evaluate the litigation conduct in its own court to determine if an effective waiver had occurred, and the court of appeals was likewise deprived, it would be ill-advised for the Court to decide the petition's issue of waiver, when resolution is necessarily dependent on the litigation circumstances. Without adequate development by the parties or the courts below, the Court should follow its practice

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10. Petitioners' failure to even hint at waiver of immunity until briefing was over deprived state officials of the ability to address significant matters that should have been aired before reaching this Court. The court of appeals limited the state officials to two pages of supplemental briefing regarding the ¶303 waiver-of-immunity contention. *See Frazar v. Gilbert*, No. 00-4112, Mar. 26, 2002 Letter Brief. The result is a record lacking consideration of any relevant factors, such as, for example, the element of "voluntariness" in light of the fact that negotiations, the fairness hearing, and adoption of the consent decree all occurred prior to the resurgence of this Court's federalism jurisprudence starting with *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

11. Petitioners also point for the first time, in passing, to other litigation conduct by state officials in defending the case. *See* Pet. 8, 9 & n.4, 12, 13 n.7. The factual circumstances of state officials' conduct over the course of the litigation, however, has never been evaluated by either the district court or the court of appeals, *see* App. 39a-42a, and petitioners never relied on those selective aspects from the case's history when they belatedly asserted a waiver based on ¶303. *See* Oct. 3, 2001 Letter 1. Similarly, petitioners direct the Court to a provision in the consent decree (¶302) that has also gone unexamined by the lower courts. *See* Pet. 12.

of not considering constitutional questions that were not appropriately "pressed or passed upon below" and decline to entertain petitioners' new challenge to the State's sovereign immunity. *See Duignan v. United States*, 274 U.S. 195, 200 (1927).[12]

B. This Case Does Not Implicate a Circuit Split on the Issue of Waiver That Warrants the Court's Review.

Petitioners claim that the Fifth Circuit concluded that state officials do not waive Eleventh Amendment immunity by urging entry of a consent decree and that other courts of appeals disagree on this point. *See* Pet. 8-9. The Fifth Circuit, however, did not reach a holding of such precision. Rather, it rejected petitioners' waiver contention in fairly short fashion without full analysis of consent-decree conduct.

Petitioners erroneously claim that five circuits disagree with the Fifth Circuit and endorse waiver by consent decree. Pet. 8. Petitioners include the Seventh and Ninth Circuits in their list, but the cited decisions from those courts merely recite the prerequisites for modification and termination of a decree. *See Komyatti v. Bayh*, 96 F.3d 955, 962-63 (CA7 1996); *Hook v. Ariz. Dep't of Corr.*, 972

12. The Court has consistently refused to consider arguments advanced for the first time in this Court. *See, e.g., Meyer v. Holley*, No. 01-1120, 2003 WL 141310, at *8 (Jan. 22, 2003); *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001); *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991); *Lytle v. Household Mfg.*, 494 U.S. 545, 551 n.3 (1990); *Granfinanciera v. Nordberg*, 492 U.S. 33, 38-39 (1989); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

F.2d 1012, 1016 (CA9 1992).[13] Decisions from the remaining three circuits likewise fail to demonstrate a real division.

Two of the decisions do not directly resolve whether agreeing to a consent decree waives sovereign immunity and instead address collateral attacks on judgments for lack of subject matter jurisdiction. Pet. 9 (citing *Garrity v. Sununu*, 752 F.2d 727, 737-38 & nn. 8, 10 (CA1 1984), and *Mitchell v. Comm'n on Adult Entm't. Establishments*, 12 F.3d 406, 408-09 (CA3 1993)). And the remaining two decisions cited by petitioners also fail to demonstrate division on the question sought to be reviewed. *Vecchione v. Wohlgemuth*, a twenty-five-year-old Third Circuit decision, was an appeal in a settled contempt action against state officials that the court held did not implicate Eleventh Amendment concerns and, *assuming* in dicta that it did, required an inference of waiver from the failure to ever raise Eleventh Amendment immunity in related litigation that was long since final. 558 F.2d 150, 152-53, 158-59 (CA3 1977). Because the court itself disclaimed any Eleventh Amendment holding, *Vecchione* is most properly classified as another collateral-attack decision.

Similarly, petitioners misplace reliance on the Second Circuit's decision in *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (CA2 1989) (citing *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 596 F.2d 27, 39 (CA2 1979)), which addressed waiver of sovereign immunity as an aside, citing a decision that itself addressed waiver

13. These cases, together with others cited by petitioners, Pet. 10, express the proposition that consent decrees should be obeyed until they are modified or vacated. That principle was not contradicted by the Fifth Circuit, as petitioners vaguely suggest, and it has never been challenged by state officials. Petitioners concede elsewhere that state officials made efforts to satisfy the consent decree. Pet. 9. Petitioners' citation to decisions setting out the standards for modification or termination of a decree fails to demonstrate a conflict or illuminate any error on the part of the Fifth Circuit.

by consent decree in an alternative holding. The dicta in that earlier decision was later flatly rejected by the Second Circuit. *See N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 727 F.2d 240, 244 (CA2 1984). Because *Kozlowski*'s waiver-by-consent-decree comment does not represent the view of the Second Circuit—and because it lacks any waiver analysis of its own—that decision cannot anchor a conflict with the Fifth Circuit.[14]

Nor, as petitioners erroneously claim, does the Fifth Circuit's holding conflict with *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 122 S.Ct. 1640 (2002).[15] Pet. 11-14. In *Lapides*, the Court decided a very narrow question: "whether a state waive[s] its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court." *Id.*, at 1642-43 (citation and quotation omitted). The Court limited its answer to "state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Id.*, at 1643. In *this* case, by contrast, the state officials did not remove this case but were involuntarily hauled into federal court. This distinction is critical. *See id.*, at 1645 ("[T]he Eleventh Amendment waiver rules are different when a State's federal court

14. Indeed, petitioners' waiver argument is inconsistent with courts' repeated rejection of the notion that entry into a consent decree constitutes a waiver of sovereign immunity. *See, e.g., Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1195 (CA10 1998) (state officials' agreement to consent decree not a waiver); *Johns v. Stewart*, 57 F.3d 1544, 1554 (CA10 1995) (State's partial settlement does not constitute waiver absent unequivocal expression of waiver); *Saahir v. Estelle*, 47 F.3d 758, 762 (CA5 1995) (entry into consent decree not an unequivocal expression of waiver); *Carey*, 727 F.2d, at 244 (agreement to consent decree does not constitute waiver).

15. The petition also suggests an inconsistency with *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 292 (1906), Pet. 11, but includes no explanation of how the decision is pertinent.

participation is involuntary.") In addition, this case does not involve an underlying claim for which the State explicitly waived its immunity from suit in state court and then attempted to regain immunity through removal. *See id.*, at 1643, 1645.

Most importantly, no court has relied on *Lapides* to find a waiver of immunity. Accordingly, it is premature for petitioners to ask the Court to decide a waiver-of-immunity issue that has not percolated in the lower courts.

C. No Waiver of Eleventh Amendment Immunity Occurred in This Case.

As previously discussed in Part I.A, *supra*, the waiver-of-sovereign-immunity issue now advanced was not pressed or passed upon in the courts below such that the issue is suitably presented for review. Moreover, consideration of this issue is unwarranted because the Court's Eleventh Amendment jurisprudence confirms that no waiver occurred in this case. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Court reconfirmed the requirement that waivers of sovereign immunity be explicit and unequivocal, squarely rejecting the concept of constructive waiver:

> [O]ur test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one. Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction, or else if the State makes a clear declaration that it intends to submit itself to our jurisdiction. *Id.*, at 675-76 (citations & quotations omitted); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (State's consent to suit must be "unequivocally expressed").

Petitioners do not suggest that state officials expressly consented to suit in federal court. Rather, they erroneously contend

in this Court that state officials affirmatively invoked the federal court's jurisdiction, causing a waiver of immunity under *Lapides*. As already explained, *see* I.B *supra*, the circumstances of this case are distinct from *Lapides* and do not constitute a voluntary invocation of federal-court jurisdiction. And, to the extent petitioners contend that there was an implied or constructive waiver, *College Savings* forecloses that theory. *See* 527 U.S., at 680; *see also Pennhurst II*, 465 U.S., at 99; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).[16]

Absent "[a] clear indication of the State's intent to waive its immunity," *Lapides*, 122 S.Ct., at 1644, the Eleventh Amendment remains intact and shields the State from suit. This case is squarely controlled by the Court's Eleventh Amendment jurisprudence,

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16. Petitioners contend that the Fifth Circuit should have implied a waiver from inconspicuous provisions of the consent decree that do not mention sovereign immunity. A waiver of Eleventh Amendment immunity, however, cannot be implied. *See Coll. Sav.*, 527 U.S., at 680; *Edelman*, 415 U.S., at 673; *Pennhurst II*, 465 U.S., at 99. Instead, a State must expressly and unequivocally consent to suit in federal court or affirmatively invoke the jurisdiction of a federal district court by, for example, removing a state-law claim for which immunity has been waived in state court. *See Lapides*, 122 S.Ct., at 1643. Nothing remotely comparable occurred in this case. And the federal courts of appeals to consider *Lapides*' waiver holding have limited its application to removal circumstances. *See, e.g., Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1206 (CA10 2002) ("It is only when a State removes federal-law claims from state court to federal court that it submits its rights for judicial determination and unequivocally invokes the jurisdiction of the federal courts.") (citation and quotation omitted); *R.I. Dep't*, 304 F.3d, at 48-49 (rejecting argument that a State waives its immunity by voluntarily participating in any facet of a federal adjudicative proceeding); *see also, e.g., Watters*, 295 F.3d, at 42 n.13 (observing that *Lapides* does not extend to attorney's liens for which immunity has not been waived in sovereign's courts).

which precludes an inference of waiver. Accordingly, no important or unsettled question of federal law warrants review.

II. No Statutory Issues Warrant the Court's Review.

A. The Fifth Circuit Properly Decided That the Eleventh Amendment Limits a District Court's Consent-Decree Jurisdiction to Enforcement of Federal Rights.

Although petitioners contend that other circuits disagree with the Fifth Circuit's conclusion that the district court's jurisdiction to enforce a consent decree is limited by the Eleventh Amendment, Pet. 14-17, the decisions petitioners cite are inapposite because they either do not address this enforceability question or they fail to consider the Eleventh Amendment.

For example, petitioners rely on *Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986), in which the Court held that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." The Fifth Circuit, however, did not reason inconsistently with *Firefighters* because it did not predicate the limitation on the district court's enforcement power on the difference between the relief available in a consent judgment as opposed to an adverse judgment on the merits. The Fifth Circuit simply found *Firefighters* inapplicable to a jurisdictional inquiry. App. 21a-25a. Moreover, as the court of appeals rightly recognized, the *Firefighters* decision addressed standards for the *entry* of consent decrees and did not involve either the enforcement of a consent decree or the Eleventh Amendment. *See* App. 21a-22a., 26a & n.67.

Similarly, in *Komyatti v. Bayh*, Pet. 15, state officials did *not* challenge the power of a federal court to enforce consent-decree provisions that exceed federal law. 96 F.3d 955, 958 (7th Cir. 1986). And the Seventh Circuit did not hold that a district court

could do so. Indeed, a later opinion confirms that the Seventh Circuit, like the Fifth Circuit, permits enforcement only of consent-decree obligations that rest on federal law. *See Evans v. City of Chicago*, 10 F.3d 474, 479 (CA7 1993) (en banc). Indeed, the cases petitioners cite do not address the enforceability and Eleventh Amendment questions considered by the Fifth Circuit. Accordingly, no division results from these cases. *See* Pet. 15-17.

Even *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (CA2 1989), which registers disagreement with the Fifth Circuit's jurisdictional view of consent-decree enforcement, fails to create a conflict. Relying heavily on *Firefighters'* discussion of prerequisites for *entry*, not enforcement, of a consent decree, the Second Circuit in *Kozlowski* sidestepped the Eleventh Amendment and rested its decision on the perceived inequities of releasing state officials from their bargain. *Id.*, at 244-45. As such, the opinion offers no reasoning that directly engages—much less contradicts—the Fifth Circuit's Eleventh Amendment holding.

Far from conflicting with other courts' analyses of the Eleventh Amendment question, the Fifth Circuit's opinion is consistent with decisions of courts that have squarely contemplated the implications of the Eleventh Amendment in the consent decree context. *See, e.g., Sweeton v. Brown*, 27 F.3d 1162, 1166 (CA6 1994) (en banc) (concluding that consent decree should be vacated because no basis in federal law supported its continuance); *Evans*, 10 F.3d, at 479-81 (holding that district court cannot require state to abide by consent decree that lacks basis in federal law); *see also Washington v. Penwell*, 700 F.2d 570, 574-75 (CA9 1983) (concluding that funding provision in consent decree was unenforceable because it exceeded constitutional requirements).

And all of these decisions are consistent with the fundamental Article III tenet that parties cannot broaden the constitutional scope of a federal court's power by agreement or consent. *See, e.g., Ins.*

Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 (1951). Petitioners fail to account for this jurisdictional principle in asserting that the requirements of federal law should not be the outer boundary of a district court's enforcement powers. Moreover, petitioners ignore this Court's admonition that "the *Young* doctrine rests on the need to promote the vindication of *federal* rights." *Pennhurst II*, 465 U.S., at 105 (emphasis added).

This long-standing principle is not contradicted by *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 122 S.Ct. 1753, 1761 (2002), as petitioners erroneously suggest. *Verizon* did not concern a consent decree or the reach of a federal court's enforcement power. When enforcing a consent decree, a court must assess alleged violations and determine whether remedial jurisdiction exists, and *Verizon* does not suggest otherwise.

The Fifth Circuit conducted an Eleventh Amendment analysis within the consent-decree context that is consistent both with this Court's Eleventh Amendment jurisprudence and the decisions of other courts of appeals that have addressed enforcement issues in the face of a defendant's assertion of Eleventh Amendment immunity. No conflict or important and unsettled question is presented, and the Court should deny the petition.

B. This Case Presents No Question of EPSDT Rights That Warrants the Court's Review.

Petitioners claim that this case involves an important question regarding federal Medicaid rights, but they fail to present a particular statutory concern or identify a division in the circuits over a specific EPSDT issue. An even more fundamental flaw is that petitioners' EPSDT arguments rest on a misapprehension of the Fifth Circuit's holding.

The Fifth Circuit did not, as petitioners claim, "decide[] that indigent children who qualify for Medicaid do not have a right to actually receive the EPSDT information, screens and services that they need." Pet. 24 (citing App. 33a-39a). The court simply reviewed the petitioners' complaints about the Texas EPSDT program and decided that these particular grievances were not premised on enforceable federal rights.[17]

Although petitioners are dissatisfied with the result reached by the court of appeals, there is nothing unusual or erroneous about the analysis conducted by the court. To determine whether petitioners could enforcement of federal rights, the court performed the formulaic analysis that has been followed in countless other cases under the standards of *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), and *Blessing v. Freestone*, 520 U.S. 329 (1997)—which were reaffirmed by the Court last term in *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

To the extent petitioners dispute the Fifth Circuit's conclusion

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17. For instance, although petitioners sought changes in state officials' provision of screening services, the court of appeals decided that petitioners had not asked the district court to enforce any federal right related to those services. The Fifth Circuit observed that the Medicaid statute requires screening services to be provided "where they are requested," and concluded that petitioners had not complained about a federal right remediable under §1983 because there was no evidence that a single class member had requested services but not received them. App. 33a (citing 42 U.S.C. §1396a(a)(43)(B)). Indeed, petitioners implicitly acknowledge that the Fifth Circuit did not hold that all EPSDT provisions are unenforceable. *See* Pet. 24 ("[T]he Fifth Circuit implied that EPSDT provisions may create rights.") (citing App. 28a). In fact, the Fifth Circuit expressly reaffirmed the continued vitality of *Mitchell v. Johnston*, 701 F.2d 337 (5th Cir. 1983), and *Evergreen v. Hood*, 235 F.2d 908 (CA5 2000), two decisions recognizing the enforceability of certain federal Medicaid rights. *See* App. 16a-19a.

based on its application of established and undisputed principles, that complaint presents an error-correction question not suitable for this Court's review. *See, e.g., Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J. dissenting) (noting that "this Court is not a forum for the correction of errors").

Nor do petitioners identify a specific Medicaid provision that is the subject of disagreement between courts of appeals or that contradicts this Court's or any other's federal-rights reasoning. Instead, petitioners reference all of the EPSDT statutory provisions as a whole and, without analyzing any particular provision, assert that "the EPSDT provisions . . . meet the *Gonzaga-Blessing* test for whether a statute creates enforceable rights." Pet. 22 (citing 42 U.S.C. §1396a(a)(43)). This flawed reasoning contradicts *Blessing*'s rejection of such "undifferentiated whole" analysis. 520 U.S., at 342. In the same cursory vein, petitioners mention the three components of the *Blessing* analysis for enforceable federal rights, but address the second and third elements solely in a one-sentence conclusory statement. *See* Pet. 22-23. This analysis fails to engage, much less reveal any error in, the fully reasoned application of the complete *Blessing* test.

For example, petitioners cite (without explanation or argument) *Stanton v. Bond*, 504 F.2d 1246, 1250 (CA7 1974), a case that predates *Blessing* and *Wilder* and, therefore, lacks the federal-rights analysis established by those cases. Petitioners also erroneously attempt to demonstrate circuit disagreement about EPSDT rights by relying on arguments made in petitions for certiorari in other cases. *See* Pet. 23 (citing Pet. for Cert., *Odom v. Antrican*, No. 02-220; Pet. for Cert., *Haveman v. Westside Mothers*, No. 02-277).[18] Tellingly, petitioners do not, and cannot, contend that the lower courts' decisions in those two cases conflict with the Fifth Circuit's

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18. The Court denied the petition in *Antrican* on October 21, 2002 and the petition in *Westside Mothers* on December 2, 2002.

decision in this case.

Without identifying a particular federal right or a true circuit division, petitioners present no federal question that warrants the Court's review on the correct application of *Blessing* in the Medicaid context.

III. Alternative Grounds for Affirmance Make this Case an Inappropriate Candidate for Review.

If the Court were to grant the petition, respondent officials would defend the judgment below by advancing alternative grounds for affirmance raised in the Fifth Circuit briefing but not reached by that court. *See Blum v. Bacon*, 457 U.S. 132, 138 n.5 (1982) (noting the respondents "may rely upon any matter appearing in the record in support of the judgment below"); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977) (explaining that respondents are "entitled under our precedents to urge any grounds which would lend support to the judgment below").

Although the court of appeals's disposition pretermitted consideration of the parties' disputes over the many decree provisions, a respondent may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Although this strong ground for affirming the judgment would be presented for this Court's review should it grant the petition, the existence of this alternative ground for affirmance provides yet another reason why this case is an unsuitable vehicle for review of the questions urged by petitioners. The Court would become mired in a wide-ranging collection of decree provisions and an evidentiary record regarding the delivery of health care services by Texas's EPSDT program. Indeed, the bulk of the district court's 175-page opinion was dedicated to an interpretation of the 308-paragraph consent decree and an evaluation of state officials'

delivery of EPSDT services using statistical and anecdotal evidence. Because the issues related to interpretation of the decree and assessment of any violations under its terms concern only a particular order as applied to a discrete set of facts, this case does not merit the Court's attention.

Conclusion

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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